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Supreme Court of the United States

OCTOBER TERM, 1964.

No. 946

AAA CON DRIVERS EXCHANGE, INC., IRVING ZOLA and HELEN ZOLA, and AAA CON DRIVERS EXCHANGE-L. A., INC.,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Supreme Court of the United States

OCTOBER TERM, 1964

AAA CON DRIVERS EXCHANGE, INC., IRVING ZOLA and HELEN ZOLA, and AAA CON DRIVERS EXCHANGE-L. A., INC.,

Petitioners,

against

INTERSTATE COMMERCE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners, defendants below, pray for a writ of certiorari to review a judgment of the Court of Appeals for the Second Circuit, which reversed a judgment of the District Court for Southern New York.

The judgment of the District Court was rendered October 5, 1964. Its opinion which incorporated its findings of fact and conclusions of law is reported at 234 F. Supp. 66. It is also set forth in the record in the Court of Appeals filed herewith. The opinion of the Court of Appeals appears as Appendix B hereto.

The judgment of the Court of Appeals sought to be reviewed is dated January 20, 1965, and was entered on that day. This Court has jurisdiction to review such judgment by writ of certiorari under §1254 of the Judicial Code. The District Court had jurisdiction of the suit by reason of §222 of the Interstate Commerce Act [49 U. S. C. 322].

Except where otherwise indicated numbers in brackets are references to pages of the certified transcript of the record.

Questions Presented.

1. Whether one who neither owns, leases, hires, rents, furnishes, supplies or operates a motor vehicle, nor controls anyone owning or driving such vehicle, is or can be held to be a common carrier for hire subject to regulation as such by the Interstate Commerce Commission.

2. Whether the business of bringing together, as an intermediary, (a) the owner of a private pleasure automobile who is about to depart for a distant point where he would like to use his automobile on arrival, but prefers to travel to destination by other means of conveyance, and (b) a student or other casual traveler who is headed in the same direction and is willing to drive the automobile there, which transportation is itself exempt from regulation under the Act by §203 [49 U. S. C. 303] (b) (9), is also exempt from such regulation.

3. Whether in holding that, in order to continue in business at all, petitioners must change their operations from a lawful brokerage business to a transportation business which would be subject to the regulation of the Interstate Commerce Commission and its existing rules, the Court of Appeals is depriving petitioners of their liberty and property without due process of law, contrary to the Fifth Amendment to the Constitution of the United States.

Applicable Statutes.

Respondent brought this suit for an injunction under §222(b) of the Interstate Commerce Act, 49 U. S. C. 322, and relied upon, as the basis of petitioners' liability, the following provisions of the Interstate Commerce Act: §203

[49 U. S. C. 303] (a) (14), (c); §206 [49 U. S. C. 306] (a) (1); and the preamble to the Interstate Commerce Act, [49 U. S. C. preceding §§1, 301, 901, 1001]. These provisions, as set forth by respondent below, appear as Appendix A hereto.

Petitioners rely in part upon §203, 49 U. S. C. 303(b)(9), which excepts from the operation of the Act,

> "(9) the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker, or by any other person who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this chapter or under a pending application for such a certificate or permit."*

Statement of the Case.

Respondent, plaintiff below, sought a permanent injunction enjoining petitioners from transporting property by motor vehicle in interstate or foreign commerce upon public highways for compensation as a motor common carrier unless and until they obtained from respondent a certificate of public convenience and necessity [4a-10a]. Petitioners denied that they are engaged in such transportation, alleging that they acted solely in the capacity

* Respondent conceded below [73a] that if petitioners conduct a true brokerage operation no authority is required from the Interstate Commerce Commission.

of intermediaries between persons whose activities are exempt from regulation by the Commission [11a-17a]. The District Court, Frederick v. P. Bryan, J. [79a-80a], after taking testimony, dismissed the complaint with an opinion [53a-78a], which incorporated its findings of fact and conclusions of law. The Court of Appeals reversed on January 20, 1965 [Appendix B], in an opinion which did not question any of the findings of fact below.

Petitioner AAA Con Drivers Exchange, Inc. and its counterpart AAA Con Drivers Exchange-L.A.-Inc., are engaged in the business of bringing together travelers, who wish to drive cars to their destinations, with car owners who wish their cars driven to the same destinations, for a fee paid by the traveler for the introduction. AAA Con receives inquiries from car owners and from prospective drivers through advertisements placed in the Classified Telephone Directory and in the New York Times. It screens the drivers and, if satisfied, puts them in touch with the inquiring car owners. Incidentally, the corporate petitioners mentioned furnish standard forms for the formalization of the arrangement between traveler and car owner.

Petitioners Irving Zola and Helen Zola are respectively, the president and secretary of each of such corporations and the owners of all of its capital stock. They are not otherwise involved and do not do business as individuals. For simplicity reference will be made only to "AAA Con" or "petitioner".

The complete operation of petitioner's business is fully set forth in the District Court's opinion [53a-78a].

ARGUMENT.

POINT I.

Petitioners are not engaged in the transportation of persons or goods for hire and, hence, are not subject to regulation by the Interstate Commerce Commission.

A. Petitioners conduct a local business of bringing car owners and travelers together; they are not engaged in any interstate or foreign operations on any public highway.

Petitioners neither own, lease, hire, rent, furnish, supply or operate a motor vehicle, nor exercise any control over one owning or operating such vehicle.

In the typical situation with which this case deals, a car owner who wishes to have his car available to him at a distant point, but not to drive it there, desires a driver to take the car to its destination. A traveler who wishes to make a trip to the same destination desires a car to transport him thither. The car owner may never have occasion to send his car to that destination again; the driver may never have occasion again to make the trip.

The statute by §203 [49 U. S. C. 303] (b)(9) excepts from regulation under the Act: "the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, * * *".

The transaction between car owner and traveler is certainly "casual", "occasional" and "reciprocal". The statutory exception does not require a car owner and driver to be related by blood or marriage, or even that they shall have met socially. The use of the words "for compensa-

tion" indicates a commercial transaction. The bringing of the parties together for a fee is a natural corollary of the statute.

AAA Con assumes no responsibilty for any phase of the proposed trip [70a-71a]. AAA Con's function ends when the car owner accepts a driver whom AAA Con has screened and introduced to him. Nor does AAA Con hold out to the public or to the car owner that it offers a transportation service. The car owner understands that AAA Con's function is not transportation. At the very first contact with the car owner, he is sent a letter, enclosing a form of authorization directed to AAA Con, and a form of contract to be entered into between the car owner and the driver [3d]. The letter of transmittal says: "The arranging for such a driver is our principal and sole function." In the form of authorization to be signed by the car owner, the latter states "I fully understand that AAA Con Drivers Exchange, Inc. is not engaged in the operation of transporting or delivering automobiles and further understand that the principal and sole function of AAA Con Drivers Exchange, Inc. is that of screening and selecting of drivers."

Petitioner is no more engaged in transportation than a nurses' registry is engaged in nursing. Petitioner's operation is similar to that of an employment agency where the fee charged is based upon the amount which the employee expects to receive. The fee charged by petitioner is not in proportion to the distance traveled [65a] as it would be in the case of a transportation business. As to supplying forms for the essential documents between car owner and traveler, surely this is no more transportation than the printing and publishing of legal forms is practising law.

This Court has never had the question now presented, though it denied certiorari (372 U. S. 960) in *I. C. C.* v.

Dudgeon (S. D. Cal. 1961), 213 F. Supp. 710. It is unnecessary at this point to analyze all of the cases in the lower courts that have dealt with a "driveaway" service, since the Court of Appeals concedes [App. B-9, 10] that all of such cases, including *Dudgeon*, are distinguishable from the present, that in each of them the Commission's opponent exercised at least some measure of control of the trip itself and did not, as in the case of AAA Con, end its service with the introduction of the parties and furnishing them with a form of written contract.

While the persons whom petitioner introduces to the automobile owners are students or similar persons and not taxi drivers or other professional chauffeurs, and while the automobiles that they agree to drive for the owners are private passenger cars and not tractor-trailers or similar trucks intended to transport goods of any kind, nevertheless the principle for which petitioner here contends was recognized in *B & C Truck Leasing, Inc.* v. *I. C. C.* (10 C. A. 1960), 283 F. 2d 163, 165:

> "One engaged exclusively in leasing trucks for use by others in the transportation of their own property on the highways *or one engaged solely in furnishings drivers to drive trucks for others in the transportation of their own property on the highways without more, is not required to obtain a certificate of convenience and necessity or a permit issued by the Commission* (emphasis ours).

Apart from the decision below, this is the only authoritative statement by an appellate court on the point in question.

B. The Court of Appeals erred in holding that the Commission by reason of its expertise in transportation matters might reach out for a jurisdiction it does not have.

The Court of Appeals held as it did "recognizing the case to be close to the line" [App. B-2].

The nub of the decision below was that petitioner was not "beyond a rational construction of the prohibitory language of the statute, which Congress entrusted the Commission to administer [App. B-8]". Thus, the Court of Appeals puts this case in a class with those in which this Court, dealing with vague statutory terminology, has accepted the view of the administrative body because of its expertise in the field. It cites *Gray* v. *Powell* (1941), 314 U. S. 402, 411; *Board* v. *Hearst Publications, Inc.* (1944), 322 U. S. 111, 131; *Labor Board* v. *Coca-Cola Bottling Co.* (1956), 350 U. S. 264, 269. In those cases this Court accepted the help of the administrative body on whether a railroad was a "producer" of coal, whether newsboys are "employees", and who are "officers" of a labor union.

But surely this Court needs no help to determine that one who neither owns, leases, hires, rents, furnishes, supplies or operates a motor vehicle, nor exercises any control over one owning or operating such vehicle is, or is not engaged in transportation by motor vehicle.

Moreover, to turn to the Commission for assistance in the present case is in this field, at least, to lean on a broken reed. The Commission was once of the view that the present operation was not transportation. In *Automotive Shippers, Inc.* (1955), 64 M. C. C. 475, the Commission said (p. 481):

> "Assuming, improbable as it seems, that all drivers whose services are arranged for by applicant are bona fide travelers, who are not engaged in trans-

> portation as a regular business, do not receive any compensation other than the use of the car, and do not carry passengers for hire, then applicant's operation would appear to require no authority from this Commission. Section 203(b) (9) of the act exempts from regulation those persons who casually or occasionally transport property for compensation."

True, as the Court of Appeals points out [App. B-9], the Commission subsequently retreated from this position. *AA Auto Delivery, Inc. Common Carrier Application* (1958), 77 M. C. C. 365, 372-3. In view of this wavering, however, it would appear that the Commission needed help from the Court rather than the Court from the Commission. In *Burnet* v. *Chicago Portrait Co.* (1932), 285 U. S. 1, the Court said, per Chief Justice Hughes (p. 16):

> "The Court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons."

The Supreme Court has used similar language in dealing with the Interstate Commerce Commission. *United States* v. *Missouri Pacific R.R. Co.* (1929), 278 U. S. 269, 280.

More fundamentally, the Commission cannot be allowed to have the last word where the question is one of its own jurisdiction. Congress, no doubt, might have given the Commission jurisdiction over petitioner as incidental to interstate commerce. It has not done so. The Commission claims jurisdiction only upon the ground that petitioner is a common carrier; unless it be determined that it is, the statutory scheme for regulation does not apply. *Crowell* v. *Benson* (1932), 285 U. S. 22, 54-5.

So far as its determination is independent of the Commission, the Court of Appeals appears to rest its reversal of the District Court upon two propositions: (1) that petitioners' advertisements may be read as a holding out of common carrier service [App. B-8, 10]; and (2) that AAA Con, not the driver, fixes the rate the owner must pay the driver [App. B-8]. Yet "the Commission has little quarrel with the findings of fact" [of the District Court] and apparently the Court of Appeals also accepts them [App. B-2].

The contention that there was a holding out of transportation is based on the fact that in the classified telephone directory petitioners' advertisments "Drivers available", etc. appear under the heading "Automobile & Truck Transporting". This was not by petitioner's wish. The District Court made a precise finding on this [64a], explaining that this was the only place in the telephone directory in which the telephone company could insert it. There was no heading "Driver's Exchange" [64a].

Again, the finding is not that the fee to be paid the driver is established by AAA Con. The finding is "While the amount to be paid to the drivers is set by the owner, it is fixed with the advice of AAA Con as to the chances of obtaining a driver for the trip at that figure". The estimate given by AAA Con at any given season is largely dependent upon the supply of drivers available [65a]. This estimate is not conclusive on the driver or owner. Upon their meeting either may reject the other [63a].

Thus, although the Court of Appeals did not reject the findings of the District Court, and could not have done so unless they were "clearly erroneous" [F. R. Civ. P. 52(a)], its decision is not grounded upon the findings.

POINT II.

The compulsion to drop the business of acting as an intermediary for casual and reciprocal arrangement between traveler and car owner, and to accept regulation as a common carrier for hire is a deprivation of liberty and property contrary to the Fifth Amendment.

The Court of Appeals suggests a stay by the District Court to enable AAA Co. to apply for a certificate of convenience and necessity, and in a footnote [App. B-11] indicates that by reason of a favorable result in the District Court, it may be regarded as "fit" under §207 of the Act [49 U. S. C. 307].

But much more is involved than a change from an unregulated to a regulated operation. Acceptance of the invitation of the Court of Appeals requires the cessation of the present business and the embarking upon a wholly different type of business. The business of acting as an intermediary to arrange exempt reciprocal transportation of car and traveler is destroyed. Petitioner is compelled to enter the entirely new business of common carrier for hire.

The reciprocal arrangement, whereby the car owner contributes his car to the traveler and the traveler contributes his services as driver to the car owner, is a perfectly lawful business. A mutual accommodation of owner and traveler has economic value and injures no one. Nor does it bear any resemblance to carriages by railroad, bus or waterway, which are the prime concern of the Commission. The importance of preserving such "driveaway service" is expressly recognized by the Act in granting the exemption of §203 [49 U. S. C. 303] (b) (9).

Nor did Congress intend that the benefit of the exemption should be only for relatives or social acquaintances for whom the "compensation", for which the statute provides, would seldom be appropriate.

The business of bringing the car owner and traveler together offends no law or public policy. "Detriment to the public interest will not be presumed where nothing sinister or improper is done or contemplated." *Steele* v. *Drummond* (1927) 275 U. S. 192, 205. As stated by Mr. Justice Douglas, as Circuit Justice, in *Standard* v. *Olesen* (1954) 98 Law Ed. 1151, 1153, 74 Sup. Ct. 768: "Under the law, as presently written, every business, until found unlawful, has the right to be let alone." This, of course, is merely an adaptation of the proposition that the Constitution guarantees to each person "the right of the individual to contract, to engage in any of the common occupations of life". *Meyer* v. *Nebraska* (1923) 262 U. S. 390, 399.

Upon assuming the role of common carrier, petitioner has not only substituted one business for another, but the exempted transportation itself has entirely disappeared. The car owner is no longer a person reaching an accommodation with the traveler, but has become a mere shipper, no different from the shipper who has entrusted his car to rail or truck, except that his car will be driven under its own power. It is doubtful if his own insurance would then avail him. The driver is no longer a traveler seeking a reciprocal arrangement accommodation, but an employee of the common carrier for whose acts and omissions petitioner in its new role is liable. The freedom of contract of the traveler and the car owner to go anywhere mutually agreed upon, which is the great value of the "driveaway service", is gone. Trips may be undertaken only to prescribed destinations and the driver is limited, if not to a specified route, at least to territory to be traversed. §208 [49 U. S. C. 308].

Instead of the driver paying petitioner, as now, for introduction to the car owner, the car owner as shipper would pay petitioner as carrier, and petitioner would pay the driver his wages as an employee. The traveler or driver would be less his own man. He would have to satisfy all of the numerous and detailed requirements prescribed by the regulations for a professional driver [49 CFR 191.2-5, 191.6, 191.8-10, 191.13]. He would needs be versed and schooled in all of the many and detailed regulations of the Commission applicable to drivers and driving. No longer a student on vacation, or a waiter going to his job, and accustomed to driving only a pleasure car, the driver must needs be one having the qualifications for driving a heavily laden tractor trailer or a passenger laden bus. There would be eliminated from the pool of available drivers nearly all who presently constitute that pool.

On its part, the intermediary, now changed to a common carrier for hire, would be obliged to file, post and publish its rates for every destination to which it was authorized to drive a car. §217 [49 U. S. C. §317] and, since such rate could not be discriminatory, this in itself would limit the service which could be offered the public. So, also, with the requirement that it must designate an agent for service of process in each state through which it operates. §221 [49 U. S. C. §321]. The car owner might well be embarrassed by the requirement that the carrier must assert its lien for charges and may not deliver the car at destination unless they are paid. §223 [49 U. S. C. §323]. To top it all, the car throughout the trip would have to carry an identification plate or sticker §224 [49 U. S. C. §324], which would indicate that the transportation is being done by petitioner and not in the reciprocal arrangement now contemplated by subdivision §203(b)(9).

Where petitioners' present function now stops with the introduction of car owner and driver it would, as a common carrier, direct and control the transportation to its conclusion with all its attendant responsibilities.

Whether by injunction against petitioners' present business or by a requirement that petitioners assume an entirely new and different business, the Court of Appeals has infringed petitioners' constitutional rights to continue its present lawful business. To the extent that the Interstate Commerce Act is interpreted to justify such a determination it is in conflict with the Fifth Amendment.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, N. Y.
March 1, 1965.

Harold Harper,
Vincent P. Uihlein,
Counsel for Petitioners.

APPENDIX A

The Applicable Statutes.

SECTION 222(b) of the Interstate Commerce Act, 49 U. S. C. 322(b):

> If any motor carrier or broker operates in violation of any provision of this part * * *, the Commission or its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this part * * *; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees and representatives from further violation of such provision of this part * * * and enjoining upon it or them obedience thereto.

SECTION 203(a)(14) of the Interstate Commerce Act, 49 U. S. C. 303(a)(14):

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes * * *.

SECTION 203(c) of the Interstate Commerce Act, 49 U. S. C. 303(c):

> Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in

force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, * * *.

Section 206(a)(1) of the Interstate Commerce Act, 49 U. S. C. 306(a)(1):

> Except as otherwise provided in this section and in Section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations * * *.

Preamble to the Interstate Commerce Act, 49 United States Code, preceding Sections 1, 301, 901, 1001:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for tranportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this

Act shall be administered and enforced with a view to carrying out the above declaration of policy.

§203(b)(9) of the Interstate Commerce Act, 49 U. S. C. 303(b)(9), being one of the exceptions to the preceding provisions of §203:

> (9) the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business, unless, in the case of transportation of passengers, such transportation is sold or offered for sale, or provided or procured or furnished or arranged for, by a broker, or by any other person who sells or offers for sale transportation furnished by a person lawfully engaged in the transportation of passengers by motor vehicle under a certificate or permit issued under this chapter or under a pending application for such a certificate or permit.

APPENDIX B

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 267—September Term, 1964.

(Argued December 18, 1964 Decided January 20, 1965.)

Docket No. 29266

INTERSTATE COMMERCE COMMISSION,
Plaintiff-Appellant,

v.

AAA CON DRIVERS EXCHANGE, INC., IRVING ZOLA and HELEN ZOLA, and AAA CON DRIVERS EXCHANGE-L. A., INC.,
Defendants-Appellees.

Before:

FRIENDLY, HAYS and MARSHALL,
Circuit Judges.

Appeal by the Interstate Commerce Commission from a judgment of the District Court for the Southern District of New York, Frederick vP. Bryan, Judge, dismissing its complaint for an injunction against uncertificated operation of a "driveway" service. Reversed.

SEYMOUR GLANZER (BERNARD A. GOULD, Washington, D. C.; ARTHUR L. TEPPER, New York, N. Y.), for Plaintiff-Appellant.

HAROLD HARPER (HARPER & MATTHEWS, New York, N. Y., Vincent P. Uihlein, of Counsel), for Defendants-Appellees.

FRIENDLY, Circuit Judge:

AAA Con Drivers Exchange, Inc. operates what it asserts to be an employment agency bringing together the owners of automobiles who want them driven from one part of the country to another and persons who want to drive them in order to get a cheap trip. The Interstate Commerce Commission considers the operation to be a common carrier transportation service, unlawful because not certificated under the Motor Carrier Act. Judge Bryan, in the District Court for the Southern District of New York, agreed with AAA Con and dismissed the Commission's complaint for an injunction under 49 U. S. C. §322 (b). The Commission appeals.[1] Recognizing the case to be close to the line, we think it fell on the forbidden side.

The Commission has little quarrel with the findings of fact made in Judge Bryan's usual thorough fashion. We shall present a condensed version:

AAA Con obtains inquiries from automobile owners primarily as a result of listings and advertisements in the newspapers and in the classified section of the telephone directory. A sample, from the Manhattan directory, contains a box, under the heading "Automobile & Truck Transporting," with a larger advertisement making substantially the same representations. These include statements that "Certified & Bonded Drivers" are "Available to Drive Your Car to and from Anywhere in the U. S. A." with "Low Rates," "Bonded Drivers," "Door to Door Service"

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[1] Since the action was brought by the Commission rather than by the United States, the appeal was properly taken to this court and not to the Supreme Court under 49 U. S. C. §45. See *Piedmont & No. Ry. v. ICC*, 286 U. S. 299 (1932); *United States v. New York, N. H. & H. R.R.*, 276 F. 2d 525, 541 (2 Cir.), cert. denied, 362 U. S. 961 (1960).

and "Branch Offices." Another form of the advertisement said that service was "Guaranteed and Assured."

On making an inquiry, the owner indicates the destination of his car. AAA Con tells him it will attempt to obtain a driver and gives an estimate of what he will have to pay the driver. Either with or without discussion the amount is then fixed, whereupon AAA Con sends the owner a form letter offering to provide him "with a BONDED, LICENSED, and REGISTERED DRIVER who will follow your instructions and deliver your car to any point in the United States." The letter states the destination and the amount agreed, which is inclusive of gasoline, oil and other driver's expenses en route. Part is to be paid directly to the driver at the beginning of the trip and the balance at destination. AAA Con disclaims any responsibility for the transportation or delivery of the automobile. Enclosed with the letter is an "Automobile Ownership Authorization Order" with blank spaces for the name, address and telephone number of the owner, the destination, a description of the automobile, the date when the driver is to be available, and the amount to be paid him at the starting point and at destination. It authorizes AAA Con to process a driver to drive the car "as per . . . [owner's] instructions" and guarantees that the vehicle is fully insured. The owner acknowledges his understanding that the driver is not an agent of AAA Con, and that the latter's sole function and responsibility are the screening of drivers and not the transportation or delivery of the automobile. The owner fills in this form, signs it and mails one copy to AAA Con.

AAA Con also receives inquiries from persons able to drive cars who are looking for an inexpensive means of getting about. Assuming that a car to the desired destination and at an appropriate date is available, AAA Con, if satisfied with the prospective driver's general appearance, will indicate what the owner will pay him and what he must pay AAA Con. If this is satisfactory, the driver fills out a "Driver's Application for Casual and Reciprocal

Transportation," which has blanks for the date, his name, his temporary and permanent address and telephone number, the date he is willing to leave, his driver's license and social security number, and much other data. It is agreed that if his application is accepted, the driver will pay AAA Con its fee, and that AAA Con will send him to an owner who wants a car driven to the desired place at the desired time. The driver undertakes to pick up the car and drive it to the destination without carrying any paying passengers. He certifies that he is a bona fide traveller seeking casual and reciprocal transportation and not an agent or employee of AAA Con, whose only function is stated to be "to bring . . . [him], a driver, and a car owner together." He then swears to the application and signs it, and his photograph and thumb prints are affixed.

If AAA Con's investigation satisfies it that the applicant is reliable, he then pays the agreed fee, is given a "Driver's Conditional Receipt," is informed of the name, address and telephone number of the owner, and is told to get in touch with the latter. He receives two copies of an "In Transit Permit," a sample of which had been sent the owner with AAA Con's initial communication. This has his photograph and thumb prints affixed.

When the driver meets the owner, the owner looks him over and he looks the car over. If both are satisfied, they complete the "In Transit Permit," one copy being retained by the driver and the other by the owner. This authorizes the driver to drive the car to the destination and to make any necessary repairs en route up to $10; any repairs over that amount are to be made only after notification to the owner and pursuant to his instructions. The Permit provides that in case of any accident or damage the owner may retain the unpaid portion of the driver's fee as liquidated damages. The driver agrees to comply with traffic regulations, to follow the owner's specific instructions, to notify the owner in case of accident or delay, to pay for all gasoline and oil, not to carry any passengers for hire or to use the car for towing or trucking, and not to carry liquor, narcotics or anything in violation of law. It pro-

vides also that the driver is not an agent of AAA Con but an independent contractor and a bona fide traveller seeking casual and reciprocal transportation. The driver assumes all responsibility for injury to himself or any other person riding in the automobile and for any traffic fines. Upon signature the owner pays the driver the first instalment of the agreed amount, the driver drives the automobile to destination, and is then paid the balance owed him by the owner or his representative. If an owner has inquired about insurance, AAA Con will furnish him with an application, supplied to it by an insurance company, for trip liability and property insurance; if the owner wishes such insurance, he signs the application and sends it with the premium to the insurance company.

Owners' payments to drivers and drivers' fees to AAA Con bear no fixed relation to one another, or to the distance to be traversed; depending on supply and demand, a driver may make a profit out of the trip, may break even or may have to spend some of his own money.

Because the Motor Carrier Act deals with contract carriers, who must have permits, as well as with common carriers, who must have certificates, its prohibitions against unlicensed operation are considerably more complex than those added to the Interstate Commerce Act as §1(18)-(22) by Transportation Act, 1920, 41 Stat. 477. The general prohibition, contained in §203(c), 49 U. S. C. §303(c), is that:

> Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation . . .

The provision requiring certificates for common carriers is §206(a)(1), 49 U. S. C. §306(a)(1):

> Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations . . .

The circle here relevant is completed by the definition in §203(a)(14), 49 U. S. C. §303(a)(14):

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes . . .

It is too late to argue, and AAA Con does not, that a transportation service is immunized from the prohibitions of §§203(c) and 206(a)(1) of the Motor Carrier Act by the mere fact that the only thing being transported is a motor vehicle which itself furnishes the motive power. The problem seems first to have arisen in connection with the delivery of new automobiles. The Commission early took the position that delivery of a single car under its own power was no less "transportation" than was the use of one car for towing or carrying others. See, e.g., *Fleming Common Carrier Application*, 8 M. C. C. 469, 470 (1938), modified, *Alton R.R.* v. *United States*, 36 F. Supp. 898 (E. D. Mich. 1941), aff'd, 315 U. S. 15 (1942); *Lord Contract Carrier Application*, 34 M. C. C. 549, 550-51 (1942). Later the Commission extended the principle thus established to cases where the motor vehicle was not being transported for sale but merely for the convenience of an

owner, see *Automotive Shippers, Inc., Common Carrier Application*, 64 M. C. C. 475 (1955), and it has been sustained in this position by a number of court decisions, of which it is sufficient at this point to cite *ICC* v. *Interstate Auto Shippers, Inc.*, 214 F. Supp. 473 (S. D. N. Y.), aff'd *per curiam*, 323 F. 2d 367 (2 Cir. 1963). But none of this settled doctrine decides whether or not a particular "driveway" operation is a "for-hire transportation business by motor vehicle" within §203(c) or common carriage by motor vehicle within §206(a)(1).

Since 1200 motor vehicles a year are moved under AAA Con's auspices and the activity is hardly eleemosynary, it would seem rather obvious that a "for-hire transportation business by motor vehicle" is being conducted by someone. AAA Con says it is conducted solely by the drivers. If that be so, the matter would be at an end, since §203(b), one of the sections listed in the "Except as provided" prefix to §203(c), exempts from the Act, with a qualification not here material, "(9) the casual, occasional, or reciprocal transportation of passengers or property by motor vehicle . . . for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business," and, in contrast to *United States* v. *Drum*, 368 U. S. 370 (1962), the record is clear that the drivers here are not so engaged. But there was nothing "casual, occasional, or reciprocal" in AAA Con's operation, and §203(b)(9) does not assist if it also was engaged in for-hire transportation.

As said by Mr. Justice Brennan in *United States* v. *Drum*, *supra*, 368 U. S. at 375-76, "The problem is one of determining—by reference to the clear but broad remedial purpose of a regulatory statute committed to agency administration—the applicability to a narrow fact situation of imprecise definitional language which delineates the coverage of the measure." While the *Drum* decision dealt with a different although not wholly unrelated issue, the approach taken by the Supreme Court in that case—approval of the Commission's looking through form to substance, of its dealing with a "novel situation as an integral

and unique problem in judgment," 368 U. S. at 384, and of its resolving doubts so as to accomplish the basic purpose of the Motor Carrier Act—calls for reversal here.

The definition of "common carrier by motor vehicle" in §203(a)(14) stresses not what a person does but what he holds himself out to do. Holding out is important not only because of the significance historically given to it but because, even if the performance does not match the promise, the latter may have the adverse effect on "existing carriers upon whom the bulk of shippers must depend for access to market" which underlies the requirement of a certificate or permit. *United States* v. *Drum, supra,* 368 U. S. at 374-75. Nothing in AAA Con's advertisements disclosed the features now stressed as showing it was to be a mere intermediary between owner and driver. For all that appeared in them, AAA Con would set and collect the rates and furnish and pay the driver; indeed, that is precisely the impression the advertisements give and must have been intended to give. When we proceed from the advertisements to the facts concerning AAA Con's operation, we find these likewise irreconcilable with AAA Con's image of itself. AAA Con, not the driver, fixes the rate the owner must pay, and the higher this is, the more AAA Con can get from the driver. It thus has every bit as much interest in the transportation payments as if it collected these from the owners and paid the drivers out of them, as in the *Automotive Shippers, Inc.* case, *supra,* 64 M. C. C. at 476, and its position differs from that of an employment agency which collects a fixed fee, a percentage of the salary fixed by the employer for the employee, or a combination of the two. Moreover, AAA Con sets all the terms of the relationship; the driver and the owner do not make their own arrangements, as would normally be done between employer and employee. We cannot say that one who holds himself out and acts as AAA Con has done has effectively placed himself beyond a rational construction of the prohibitory language of the statute, which Congress entrusted the Commission to administer. Yet we would have to go

that far to sustain the judgment of the district court. *Gray* v. *Powell*, 314 U. S. 402, 411-13 (1941); *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130 (1944); *NLRB* v. *Coca-Cola Bottling Co.*, 350 U. S. 264, 269 (1956).

AAA Con makes much of a dictum by Division 1 in the *Automotive Shippers, Inc.* case, *supra*, 64 M. C. C. at 481, that: "Assuming, improbable as it seems, that all drivers whose services are arranged for by applicant are bona fide travelers, who are not engaged in transportation as a regular business, do not receive any compensation other than the use of the car, and do not carry passengers for hire, then applicant's operation would appear to require no authority from this Commission." But it is scarcely denied that the statement was erroneous as applied to the facts of that case where Automotive Shippers collected directly from the owner, since the dictum confused the status of the driver—who indeed would be exempted by §203(b)(9) on the facts indicated in the quotation—with that of the enterprise that hired him; and the Division lost little time in retracting its error and setting things straight. *AA Auto Delivery, Inc., Common Carrier Application*, 77 M. C. C. 365, 372-73 (1958). We have been pointed to no decision in which the Commission ever gave effect to the quoted dictum. On the contrary, in *AA Auto Delivery, Inc., supra*, and in *Service Associates, Inc., Investigation of Operations*, 89 M. C. C. 33 (1962), it required certification where the drivers were just as "casual" as here.

AAA Con endeavors to distinguish a considerable number of judicial decisions which have granted injunctions against uncertificated driveway services or refused to enjoin cease and desist orders of the Commission with respect to them. Thus, it notes that in the case in this circuit, *ICC* v. *Interstate Auto Shippers, Inc., supra*, 214 F. Supp. 473, aff'd *per curiam*, 323 F. 2d 367, the service was made the owner's agent, specified the route, and altogether exercised a greater degree of control than AAA Con. It points out that in *ICC* v. *Dudgeon*, 213 F. Supp. 710 (S. D. Cal. 1961) (9 Cir.), cert. denied, 372 U. S. 960

(1963), the service gave instructions as to the highways to be traversed, the miles to be traveled, the date of delivery, and any mechanical peculiarities or requirements of the car; that in *Orleman* v. *United States,* 219 F. Supp. 945 (E. D. Mich. 1963), the service often signed contracts in the owner's name and delivered the automobile to the driver, regularly instructed the driver to make oil changes, and gave him a postcard to mail back at the halfway mark; that in *ICC* v. *Teeter,* 228 F. Supp. 479 (N. D. Ga. 1964), the owner would deliver his car to the service rather than directly to the driver; and that in *Spencer* v. *United States,* —— F. Supp. —— (N. D. Ohio, 1964), part of the fee was paid directly to the service, which also had given the driver more instructions than here.

Everything said by AAA Con's counsel with respect to these decisions is precisely correct, and we readily agree that AAA Con made a more expert endeavor to take itself out of the reach of the statute than these other services had done. But the question is not whether AAA Con's operation is different from these others, but whether it is so different as to require the Commission to treat it differently. "We deal in totalities; indicia are instruments of decision, not touchstones," *United States* v. *Drum, supra,* at 384. We are convinced that the Commission rationally could and its decisions show us that it would conclude that, after all the shearing was over, AAA Con still led its customers to believe that it, and not simply the drivers, was getting their cars from one place to another and that it was not acting merely as an employment agency. We wholly agree that AAA Con is not obliged to conduct its operations in such a fashion that it must get a certificate. But Mr. Justice Holmes' famous words fit the case rather well: "We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the

policy if not by the mere letter of the law." *Bullen* v. *Wisconsin*, 240 U. S. 625, 630-31 (1916).

We therefore reverse the judgment dismissing the complaint and direct the district court to issue an injunction. We leave it in Judge Bryan's sound discretion to decide, after appropriate hearing, whether the injunction should be stayed if AAA Con promptly files an application for a certificate and diligently prosecutes this.[2]

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[2] We are unable to share AAA Con's fears that an application for a certificate is sure to be denied, presumably on the ground that its unlawful operations show it not to be "fit." The Commission has not regarded such operations as a bar if these were conducted in a not unreasonable belief as to their legality—a test rather clearly satisfied when they have passed muster in the reasoned view of a district judge. See, e. g., *Moyer Common Carrier Application*, 83 M. C. C. 83 (1960). Cf. *Bowman Transp., Inc.* v. *United States*, 211 F. Supp. 354 (N. D. Ala. 1962).